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No. 83-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER WALTON, *Appellant*

v.

ALASKA BAR ASSOCIATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

REPLY TO MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States require that when fraud is alleged in attorney discipline proceedings proof must be by clear and convincing evidence?

2. Does the equal protection clause of the Fourteenth Amendment to the Constitution of the United States require that proof be by clear and convincing evidence in attorney discipline proceedings when the standard of proof in judicial disciplinary proceedings is by clear and convincing evidence?

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APPELLEE'S DESCRIPTION OF THE PROCEEDINGS BELOW DEMONSTRATES THE CONSTITUTIONAL NEED FOR A STANDARD OF CLEAR AND CONVINCING EVIDENCE IN ATTORNEY DISCIPLINE PROCEEDINGS

Appellee argues that the preponderance of the evidence standard is all that is constitutionally required in attorney discipline proceedings as such a standard "promotes public confidence in the high ethical conduct of attorneys" and that this confidence may be eroded if lawyers are allowed to practice law undisciplined when it is "more likely than not" that an unethical act has occurred. (Motion to Dismiss or Affirm at 15-16). Appellee in effect argues that where there is smoke, fire should be presumed, and it is accordingly better that an innocent lawyer be punished for the enhancement of the public image of the profession than to meet a toilsome burden of proof. Appellee amply demonstrates the consequences of this approach in its description of the facts below.

Appellee asserts that the document in question, Exhibit B to the Amended Complaint, was mistakeningly relied upon and exposed only when "no such document could be found in the [Aleut] corporation's files." (Motion to Dismiss or Affirm at 5). This is not a correct statement of the record. A search of the Aleut Corporation's files was conducted at *Walton's* direction after Childs' deposition of April 13, 1978. (Tr. at 174-176). No search was conducted through the corporate files after the Amended Complaint was filed with inference of discovery, contrary to Appellee's suggestion. Appellee further asserts with italicized emphasis that at the second Childs' deposition on April 21, 1978, Walton disclosed the origins of Exhibit B only after the so-called "smoking gun" memorandum was produced, inferring that Walton was cornered into a position of disclosure. (Motion to Dismiss or Affirm at 5-6). In reality *Walton* voluntarily produced the smoking gun memorandum even after opposing counsel indicated he did not want to see it as it was undoubtedly privileged. (Cowden deposition at 20-26). Omitted also from this recitation is the fact that Frank Cowden, to whom the memorandum was addressed, had

personally witnessed Walton's creation of Exhibit B. (Tr. at 158). Regarding this memorandum, Justices Rabinowitz and Matthews said, "It does not constitute evidence of any intent." (Appendix 1, at 17).

Appellee concludes that Walton failed to promptly notify opposing counsel and the Superior Court that the document was a fabrication. (Motion to Dismiss or Affirm at 7). This analysis omits that Walton did in fact promptly notify opposing counsel when any question arose concerning the authenticity of Exhibit B. No such question had been raised or Court appearance made prior to Cowden's deposition where full disclosure was accomplished. These salient, exculpatory facts are glossed over in the haste to find guilt, more probable than not, and manifest the necessity for a heightened standard of proof in attorney discipline proceedings.

Unless heightened care is exercised in examining the facts and circumstances of an attorney's actions, an unjust result can, as here, occur.

There is no question that "lawyers are essential to the primary governmental function of administering justice . . . '[serve] as trusted agents of their clients, and as assistants of the court in search of a just solution to disputes'." *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460 (1978) (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)). The importance of the role of attorneys has long been recognized in this country. Indeed, the right to counsel is specifically provided for in the Constitution.[1]

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[1] Justice Black's dissent in *Cohen v. Hurley*, 366 U.S. 117, 136, 138-139, 145-147 (1961) eloquently describes both the role of attorneys and the relation of the due process of law to the profession:

> For I have always believed that those guarantees, taken together, mean at least as much as Daniel Webster told this Court was meant by due process of law, or the "law of the land," in his famous argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." . . .[12] *Dartmouth College v. Woodward*, 4 Wheat. 518, 581. See also *Vanzant v. Waddel*, 2 Yerger 260, in which Judge

Attorneys function in an adversarial process. Litigation is competitive, heated, argumentative, emotionai, and more often than not, combative. Aggressive advocacy is not only

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Catron, later Mr. Justice Catron, speaking for the Supreme Court of Tennessee, observed: "The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." *Id.*, at 270. The views expressed by Webster and Judge Catron go back at least as far as 1215 and Magna Carta, in which it was provided: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land."

. . . I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us . . . [t]he important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

. . . It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted into practice, a

a fact of life, it is a requirement of the Code of Professional Responsibility. Often, parties and, indeed, sometimes their counsel believe that the other side is "unethical", much as this

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further substantial investment must be made to enable the lawyer to build up the sort of goodwill that lies at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer — both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing, clear requirement of the law which pronounces as the penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the "law of the land" are satisfied, that is one thing. (Footnote omitted). But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a "reasonable" justification for doing so seems to me to permit plain confiscation.

Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer, but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land," both constitutional and statutory.

In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis. (Footnote omitted). Nearly a century ago, an English judge observed, correctly I think, that "short of those heavy consequences which would attach to the

Court stated in *Addington v. Texas*, 441 U.S. 418, 426-427 (1979), that, "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is, in fact, within a range of conduct that is generally acceptable." In the course of advocacy, every attorney at one time or another exhibits some behavior which might be perceived by some as symptomatic of unethical conduct, but which is in fact within a range of conduct that is generally acceptable. As in *Addington*, "there is the possible risk that a factfinder might decide to . . . [discipline an attorney], solely on a few isolated instances of unusual conduct . . . [or] idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [discipline] will be ordered." *Id* at 427.[2]

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greater and more heinous offenses, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in a such case — perhaps, after he has devoted the best years of his life to this arduous profession, — deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."

[2] The Court noted in *Polk v. Dodson*, 454 U.S. 312, 318 (1981):

> In our system a defense lawyer characteristically opposes the designated representative of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.

Chief Justice Burger said in his dissent in *In Re Griffiths*, 413 U.S. 717, 732-733 (1973):

> The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves.
>
> The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status in opposition to popular and governmental attitudes, as John Adams did in Boston to defend the soldiers accused in what we know in

Attorneys are disciplined by other attorneys, be they judges or members of the Bar. The politics and personalities of lawyers are inseparable from this process. Such bias is similar to the cultural or class bias noted by this Court in *Santosky*, 455 U.S. 745 (1982). Such factors operate to chill legitimate advocacy if only a more likely than not standard of evidence is utilized. Even though the initial hearing committee under Alaska Bar Rule 15(b) has a lay member, the committee only makes recommendations to the Board of Governors of the Alaska Bar Association which was composed solely of attorneys. They, in turn, make recommendations to the State Supreme Court.[3] The utilization of a clear and convincing standard not only will impress the factfinder with the importance of the decision and reduce the chance of inappropriate

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our folklore as the "Boston Massacre." To that could be added the lawyers who defended John Peter Zenger and down to lawyers in modern times in cases such as *Johnson v. Zerbst*, 304 U.S. 458 (1938).

In *Sacher v. U.S.*, 343 U.S. 1, 8-9 (1951) the Court observed:

> Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
>
> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

[3] The Hearing Committee recommended public censure, not suspension.

findings, but will protect the integrity and independence of advocacy. It is Walton's position that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States commands no less.

The Supreme Court of Mississippi appropriately said in 1981 in *R. L. Netterville v. Mississippi State Bar*, 397 So. 2d 878, 884 (Miss. 1981) (emphasis added):

> We have concluded that disciplinary proceedings such as those involved here, while said to be neither civil nor criminal, are of sufficient gravity to require a higher standard of evidence than that the complaints committee merely "have cause to believe" from the report that the accused attorney is guilty. A finding by the complaints committee, based upon a report to be made up as outlined above, *that the guilt of the accused attorney has been established to its satisfaction by clear and convincing evidence, is necessary in order to meet the requirements of due process.*

The risk of error should not be balanced equally between the parties as the risk of loss to the attorney is great and to the public interest in independent advocacy, greater yet.

THE PREPONDERANCE OF EVIDENCE STANDARD IN ATTORNEY DISCIPLINE PROCEEDINGS VIOLATES DUE PROCESS

Appellee asserts that the interests at stake in attorney discipline proceedings " . . . are virtually identical to the interests of the disciplined broker in *Steadman v. SEC*, 450 U.S. 91 (1981)." (Footnote omitted). (Motion to Dismiss or Affirm at 19). Attorneys are different than stock brokers. Stock brokers are creatures of, and are regulated by, the Securities and Exchange Commission. Stock brokers are not self-regulated. Stock brokers are not required to be advocates. Stock brokers are not specifically identified in the Constitution. Moreover, *Steadman* is not a Constitutional case, but rather one of statutory interpretation as to Congressional and regulatory intent. Footnote 15 to the Court's Opinion states

clearly: "Petitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing standard. See Tr. of Oral Arg. 10." *Id.* at 97. Here Walton does specifically raise the Federal Constitutional due process issue upon which the Alaska Supreme Court divided three to two.

This Court found in *Steadman* that where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court felt at liberty to prescribe the standard, for "[i]t is the kind of question which has traditionally been left to the judiciary to resolve," *Woodby v. INS*, 385 U.S. 276, 284 (1966). However, where Congress has spoken the court has deferred to, " the traditional powers of Congress to prescribe rules of evidence and standards of proof in federal courts, absent countervailing constitutional constraints." *Steadman* at 95. The discipline of attorneys has been left traditionally and appropriately to the courts and has not been addressed by Congress or even state legislatures.

In *Vance v. Terrazas*, 444 U.S. 252 (1980), this Court recognized that expatriation proceedings were peculiarly within the constitutional authority of Congress, and Congress had indeed spoken on the issue of evidentiary burdens in this field. The Court had earlier ruled in *Nishikawa v. Dulles*, 356 U.S. 129 (1958) that proof of a voluntary expatriating act must be by clear and convincing evidence. Directly thereafter Congress passed 8 U.S.C. ¶1481(c), "its evident aim was to supplant the evidentiary standard prescribed by *Nishikawa*." *Vance*, 444 U.S. at 264. The Court noted that *Nishikawa* was not rooted in the Constitution and that moreover, it was acting in the absence of legislative guidance." *Id.* 265. This Court also concluded, "contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence." *Id.* at 267.[4]

[4] Justice White noted in his concurrence in *In Re Ruffalo*, 390 U.S. 544, 566 (1968):

EQUAL PROTECTION IS INEXTRICABLY INTERTWINED WITH DUE PROCESS IN THE CONTEXT OF THIS CASE AND WAS RAISED BELOW

Appellee concedes that the equal protection issue which complained of differing standards for attorneys and judges was made below. Indeed, Appellee cites that portion of Walton's brief where this issue was raised:

> In *Hanson*, this Court cited the Supreme Court of Texas in the matter of *In Re Laughlin*:
>
> "The serious nature of the proceeding depriving one of a public office . . . ought at the very least to require proof by clear and convincing evidence."
> 265 S.W.2d at 890.
>
> The same argument can be made with regards to attorneys. The same quantum of evidence should apply to judges and lawyers as the same basic issues are involved. To do any less denies attorneys the equal protection of the law.

(Motion to Dismiss of Affirm at 21).

Deleted from this citation is the next sentence in Walton's brief which cites the Fourteenth Amendment case of *Addington v. Texas*, 441 U.S. 418 (1979) and quotes at length therefrom.

> I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.

Such a test is an articulation of at least a clear and convincing evidentiary standard.

Further, Walton here is charged with fraud, which at common law traditionally had to be proven by clear and convincing evidence. E.g., *Addington v. Texas*, 441. U.S. 418, 424 (1979); *Woodby v. INS*, 385 U.S. 276, 285 n. 18 (1966); *Bank of Pocahontas v. Ferimer*, 161 Va. 37, _____, 170 S.E. 591, 592 (1933); *Weininger v. Metropolitan Fire Insurance Co.*, 359 Ill. 584, 598, 195 N.E. 420, 426 (1935); *Bowe v. Gauge*, 127 Wis. 245, 106 N.W. 1074, 1076 (1906).

Appellee further concedes in note 7:

> Walton had argued *in support of his due process claim* that the individual interests in attorney discipline proceedings were the same as those involved in judicial discipline proceedings. Addressing this argument, the majority opinion noted (emphasis added):
>
> > In light of today's ruling we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against (sic.) a judge.
>
> 676 P.2d at 1085, n. 11.

It is uncontroverted that the Supreme Court of Alaska did specifically rule on the federal due process issue. "Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of federal due process." (App. II at 3). A facet of this ruling was to treat Walton's differing standards equal protection argument as a component of the due process claim.

Rule 16(b) states that dismissal will lie when a federal question was not timely or properly raised *and* was not expressly passed on. Here the precise argument that is stated in the second Question Presented in the Jurisdictional Statement was not only argued before the Alaska Supreme Court but was in fact considered and ruled upon. The Alaska Supreme Court recognized that there were indeed differing standards, but nonetheless did not overrule *In Re Hanson*, 532 p.2d 303 (Alaska 1975), where the clear and convincing standard was held appropriate in state judicial disciplinary proceedings. The preponderance standard proscribed by the Alaska Bar Rules in attorney discipline proceedings was in fact adopted by the Alaska Supreme Court as it is that body which promulgates Bar Rules.

In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), this Court found that Appellant had raised and preserved an issue notwithstanding wrongful reliance on the Commerce Clause as presenting a Fourteenth Amendment due process question:

> While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. *Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.* See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, and cases cited; Robertson and Kirkhan, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed)., 149 *et seq.*(Footnotes omitted)(emphasis added).

Braniff Airways,. at 598-599. Denial of equal protection is an inter-related facet of the federal due process issue upon which the Alaska Supreme Court specifically ruled. E.g., *Ellis v. Dixon*, 349 U.S. 458 (1955). In *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), the court said:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. *Crowell v. Randell*, 10 Pet. 368, 392, 398; *Neilson v. Lagow*, 12 How. 98, 109-110; *Furman v. Nichol*, 8 Wall. 44, 56; *Green Bay etc., Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 67-68; *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U.S. 592, 598-599; *Whitney v. California*, 274 U.S. 357, 360.

Judges and lawyers should be disciplined by the same criteria. Both take the same oath and both are officers to each other and the public. Appellee's attempts to distinguish judicial discipline in that "judicial disciplinary proceedings may result in removing a judge from public office" and such will be highly visible whereas attorney discipline "may not become widely known outside of lawyer and judicial circles." (Motion to Dismiss or Affirm at 25). This is a distinction without meaning.[5] Appellee asserts that "the public has a special interest in seeing that its public officials are not lightly removed from office."

(Motion to Dismiss or Affirm at 25-26). The public has an equal interest in seeing that its constitutionally ordained advocates are not disciplined without a just and legal cause.

[5] Alaska Bar Rule 26 requires written notification of suspension to all courts and publication of such in all legal journals and a newspaper of general circulation. See Appendix.

CONCLUSION

Peter Walton is innocent of any intentional wrongdoing. Whether his 24-year unblemished legal career is terminated turns upon the standard of proof applied.[6] The prosecuting attorney conceded at hearing that "The evidence is *not here clear* that there is an intentional deception on the part of Mr. Walton . . . " (Tr. at 223). Due process and the Constitutional status of attorneys require that discipline be supported by clear and convincing evidence.

For the foregoing reason this Court should note probable jurisdiction and set for argument.

Respectfully submitted this 29th day of June, 1984.

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[6] In Alaska suspension is similar to disbarment as reinstatement is not automatic but subject to showing "that the minimal qualifications, competency and learning of law required for admission to practice law in this state and that his resumption of the practice of law . . . will be neither detrimental to the integrity and standing of the bar or the administration of justice and not subversive of the public interest." Alaska Bar Rule 27. The termination of the period of suspension only allows the opportunity to apply for readmission, which may be denied.

APPENDIX

NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,

PETER T. WALTON

Attorney at Law

is suspended from the practice of law
effective from Frbuary 2, 1984
through August 1, 1985.

Please contact the Alaska Bar Association, P.O. Box 100279, Anchorage, Alaska 99510 Phone (907) 272-7469 for any questions or further information.